87-576

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HAROLD Y. SHINTAKU, AND ARNOLD B. GOLDEN,
Petitioners,

v.

DONALD D. COWAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

WARREN PRICE, III
Attorney General
State of Hawaii

CORINNE K.A. WATANABE*
First Deputy Attorney General
State of Hawaii
**Counsel of Record*

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether this Court's decisions allowing interlocutory review of denials of substantial claims of absolute officer's immunity permit review under 28 U.S.C. § 1257(3) of petitioners' claims that their federal immunity from trial upon causes of action based on 42 U.S.C. § 1983 was wrongly denied by the state courts in which respondent's federal claims were brought?

2. Whether charges of conspiracy, lack of personal jurisdiction, and other procedural errors purportedly committed by a state judge acting within his subject matter jurisdiction, and to assure the raising of a criminal defendant's lack of capacity that is a defense under state law, can strip the judge of the federal defense of absolute immunity to damages relief in a cause of action under 42 U.S.C. § 1983 to redress the judge's acts that allegedly deprived the defendant, under color of state law, of a claimed right to proceed as if he were sane?

3. Whether similar charges deprive the court-appointed psychiatrist alleged to have participated in the same alleged wrongdoing under color of state law, and from whom damages are sought under 42 U.S.C. § 1983, of the well-established immunity defense afforded to court employees, experts, and witnesses?

4. Whether, in light of the grant of review in *Forrester v. White*, No. 86-761, *cert. granted*, 107 S. Ct. 1282 (1987), the Petition should be held pending a decision in *Forrester*?*

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* Petitioners in this Court, defendants below, include only Harold Y. Shintaku and Dr. Arnold B. Golden, who were, during the events at issue, a Judge of the Circuit Court for the First Circuit, State of Hawaii, Hawaii's trial court of general jurisdiction, and a court-appointed psychiatrist under Haw. R. Civ. P. 35. Since this action was commenced, Judge Shintaku has retired from the bench. Also named as defendants below were the State of Hawaii, which was dismissed below pursuant to its sovereign immunity, the City and County of Honolulu, and a Deputy Prosecutor of the City and County of Honolulu, Sandra Alexander. The City and Alexander remain defendants pursuant to the Order of the Hawaii Intermediate Court of Appeals filed September 22, 1986, which was appealed to the Supreme Court of Hawaii by Petitioners, but not by the City and Alexander.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

The petitioners, Harold Y. Shintaku, and Dr. Arnold B. Golden, respectfully pray that a writ of certiorari issue to review the opinion and order of the Supreme Court of Hawaii, entered in this proceeding on June 23, 1987, and that, on review, the judgment below adverse to petitioners be reversed.

OPINIONS BELOW

The decisions of the Supreme Court, Intermediate Court of Appeals, and Circuit Court of the First Circuit, of the State of Hawaii, out of which this Petition arises, are not reported. The order of the Supreme Court of Hawaii dated June 23, 1987, is reprinted in Appendix ["App."] A. The Memorandum Opinion of the Intermediate Court of Appeals, filed September 22, 1986, which vacated in part the judgment of the

Circuit Court favorable to petitioners, is reprinted in App. B. The Order of the Circuit Court, entered June 14, 1983, is reprinted in App. G.

Other relevant orders include the Supreme Court of Hawaii's Order Granting Certiorari, filed October 30, 1987, and Order Denying Reconsideration, filed July 10, 1987, reprinted in App. F and J, and the Intermediate Court of Appeals' Orders Denying Appellees' Motion for Reconsideration, Denying Appellant's Motion for Reconsideration, and of Amendment, all filed October 8, 1986, which are printed respectively at App. C through E.

JURISDICTION

The Supreme Court of Hawaii granted petitioners' timely Application for Writ of Certiorari without limitation under Haw. R. App. P. 31, on October 30, 1986, and issued its Order affirming the adverse decision of the Intermediate Court of Appeals on June 23, 1987. A judgment on appeal was filed on June 30, 1987, and stayed under Haw. R. App. P. 41 pending decision upon petitioners' timely motion for reconsideration under Rule 40, Haw. R. App. P., which was filed on July 2, 1987, and denied on July 10, 1987. Under 28 U.S.C. § 2101, the time in which this Petition may be filed extends to and includes October 8, 1987, and this Petition was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). As no money judgment has been entered, this Court's authority to vindicate petitioners' immunity from litigation under 42 U.S.C. § 1983 is briefed below. The manner in which the questions presented here were raised in the state courts is also briefed below. Rule 21.1(h).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that

> In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Relevant provisions of Haw. Rev. Stat. chs. 603 and 604, relating to the jurisdiction of the Circuit and District Courts of the State of Hawaii, and Haw. Rev. Stat. chs. 704, 560, and 334, and Rule 35, Haw. R. Civ. P., concerning the power of the foregoing courts to require psychiatric examinations, and Haw. R. App. P. 31, 40, and 41, governing Applications for Writs of Certiorari and Motions for Reconsideration in the Hawaii appellate courts, are printed in the Appendix to this Petition.*

STATEMENT OF THE CASE

The central issue in this case is whether, in claims brought by a former state criminal defendant in the

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* Because the disposition of the Writ of Certiorari by the Supreme Court of Hawaii sheds little light on the issues raised below, requiring proof as to the manner in which the issues raised herein were brought to the attention of the state courts, the record necessary to this Court's review of this Petition has been reprinted in a separate Appendix. References to the printed record appear within as, *e.g.*, "A ___."

state courts under 42 U.S.C. § 1983, charges of "judicial conspiracy" and procedural irregularities in the criminal action destroy the absolute immunity enjoyed by state judges and court-appointed psychiatric experts for alleged acts within their subject matter jurisdiction that, taking the allegations of the now-plaintiff's complaint as true, had the purpose and effect of unjustifiably seeking to determine whether the criminal defendant was sane.

The controversy out of which this issue arises stems from "the pivotal role that psychiatry has come to play in criminal proceedings." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). In this case, the State of Hawaii recognized this "pivotal role" by vesting its trial judges with broad beneficial power to initiate psychiatric evaluations of criminal defendants to assure their "fitness to proceed," or to facilitate a dismissal if there is "reason to believe that [a] physical or mental disease, disorder, or defect . . . will or has become an issue in the case." Haw. Rev. Stat. § 704-404(1) (1976 & Supp. 1979).

On April 8, 1980, State of Hawaii District Judge Bertram T. Kanbara, invoking this law, ordered an examination of respondent, Donald D. Cowan, by the three-member psychiatric panel Hawaii requires for criminal cases that the judge believes may be susceptible to dismissal or suspension by reason of the defendant's lack of capacity. At the time Judge Kanbara acted, Cowan was charged with criminally assaulting and harassing his former girl-friend, Jeanette Spoone. Judge Kanbara's order was backed by an April 8, 1980, motion and affidavit from Cowan's appointed defense counsel, Lawrence A. Goya, and findings by state District Judge Andrew J. Salz, at a

March 25, 1980 hearing where Cowan was present and spoke, that evaluation was needed.

In this case, brought after the assault charge was dismissed, Cowan complains pursuant to 42 U.S.C. § 1983 that his rights under *Faretta v. California*, 422 U.S. 806 (1975), were violated by Goya's pursuit of, and the state District Court's initial recognition of, the lack-of-capacity defense. Millions in damages are sought. The defendants on this federal claim, as reinstated by the Hawaii appellate courts, are petitioners State of Hawaii Circuit Court Judge Harold Y. Shintaku and Dr. Arnold B. Golden. Each are named in their personal capacity. In the event a money judgment is entered against them, Hawaii law provides no right to indemnification from the public fisc.

Judge Shintaku did not sit on Cowan's criminal case, but was the judge in a related equity proceeding Spoone commenced before the Honolulu prosecutor filed the criminal case. Dr. Golden, a psychiatrist employed by the Department of Health, State of Hawaii, had been appointed by Judge Shintaku to examine Cowan to find out whether incarceration would cause Cowan to cease his repeated violations of an injunction protecting Spoone. Golden's January 8, 1980, report found Cowan suffering "approximate schizophrenia, paranoid type," and was relied on by Judges Salz and Kanbara in ordering, and by Deputy Public Defender Goya in seeking, appointment of the psychiatric panel.

As a Judge in Hawaii's trial court of general jurisdiction, the Circuit Court, Judge Shintaku enjoyed concurrent subject matter jurisdiction with his District Court colleagues over pretrial proceedings such as those conducted by Judges Kanbara and Salz here.

Judge Shintaku indeed had much broader power to order the psychiatric evaluations that facilitate dismissal of criminal charges—even over a defendant's objections—and of which Cowan complains, than did Judges Kanbara and Salz. The issue here is whether, given these basic facts, the Hawaii state courts' rejection of Judge Shintaku's and Dr. Golden's absolute federal immunity defenses breached immunity rules that have been reaffirmed repeatedly by this Court as inhering in the remedial scheme created by 42 U.S.C. § 1983.

A. The Background of Hawaii Law Regarding Court-Ordered Psychiatric Evaluations

Hawaii is a Model Penal Code state, and, with certain modifications, adopts the Code's standards and devices to address "the special problems raised by the insanity defense," *Jones v. United States*, 463 U.S. 354, 370 (1983), and assure compliance with the long-held principle that prohibits trial of a criminal defendant who "lacks the capacity to understand the nature and object of the proceedings against him." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). *See State v. Raitz*, 63 Haw. 64, 621 P.2d 352 (1980); *State v. Tyrrell*, 60 Haw. 17, 586 P.2d 1028 (1978).

The mainstay of Hawaii's procedures for assessing mental competence in criminal cases, which are set forth in Chapter 704, Hawaii Revised Statutes, A253-59, is Haw. Rev. Stat. § 704-404, A254. At the times relevant here, § 704-404(1) stated that "the court may immediately suspend all further proceedings in the prosecution" "[w]henever [1] the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or [2] there is reason to doubt his fitness

to proceed, or [3] reason to believe that the physical or mental disease, disorder, or defect will or has become an issue in the case[.]" *Id.*[1] The process for evaluating criminal defendants was and remains interwoven with related schemes, also overseen by our courts, for the appointment of guardians, Haw. Rev. Stat. ch. 560, art. V (1976 & Supp. 1979), A260-64, and for the civil commitment of persons who are mentally ill and duly found to be dangerous to themselves, others, or property, *id.* ch. 334, A265-78. *See* Haw. Rev. Stat. §§ 334-60(b)(4)(C), (b)(5). Each of those schemes also provided, and provides today, for court-ordered psychiatric evaluations in the best interests of the individual and to safeguard the public welfare. *See* Haw. Rev. Stat. §§ 334-60(b)(4)(G), 560:5-303(b), A261, A275.

As is true today, the Judges of the state Circuit Courts, Hawaii's trial court of general jurisdiction, enjoyed the most general subject matter jurisdiction of all of Hawaii's courts with respect to these procedures for psychiatric evaluation. The District Courts in criminal cases, for example, may try only non-jury misdemeanors, and dispose of certain motions in criminal cases generally. Haw. Rev. Stat. § 604-8 (1976 & Supp. 1979), A251. The Circuit Courts, however, have subject matter jurisdiction over all "[c]riminal

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[1] The disease or defect that excludes responsibility is that which causes a lack of "substantial capacity either to appreciate the wrongfulness of [one's] conduct or to conform [one's] conduct to the requirements of law." Haw. Rev. Stat. § 704-400 (1976 & Supp. 1979), A253. A defendant cannot be tried when "as a result of physical or mental disease, disorder, or defect he lacks capacity to understand the proceedings against him or to assist in his own defense[.]" *Id.* § 704-403, A253-54.

offenses cognizable under the laws of the State, committed within their respective circuits," *id.* § 603-21.5, A248, and enjoy broad power under the commitment, and guardianship statutes. *See id.* §§ 334-60(b)(2)(A); 560:5-102; 604-21.5(3), A248, 261, 271. In all civil proceedings, the Circuit Courts have authority to enforce provisions of the Hawaii Rules of Civil Procedure for physical examinations, Haw. R. Civ. P. 35, A285. The Circuit Courts also were empowered to "make and issue all orders . . . in aid of their . . . jurisdiction" and to "take such other steps as may be necessary to carry into full effect the promotion of justice in matters pending before them." Haw. Rev. Stat. § 603-21.9, A249.

B. The Prior State Court Proceedings[2]

Sometime in mid-1978, respondent became romantically involved with Jeanette Spoone, and the two had a brief and stormy relationship that ultimately led to a confrontation on March 28, 1979, involving respondent, Spoone, Spoone's new boyfriend, Isaac Ellison, and a neighbor, Robert Belcher, in which, according to respondent, respondent punched Spoone in the eye, Belcher broke respondent's arm, and, somehow in the process, respondent's motor scooter was destroyed. A18, 184-93.

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[2] The following recitation is taken from the undisputed court records that were submitted by respondent and noticed judicially in the lower courts, *see Fujii v. Osborne*, 67 Haw. 322, 329, 687 P.2d 1333, 1338-39 (1984), the Intermediate Court of Appeals' characterization of those records, which led to the result below adverse to petitioners, as well as respondent's own affidavit and pleadings, which were properly subject to consideration by the lower courts under Hawaii law, and which have been reprinted in relevant part in the Appendix to the Petition.

This and other events led Spoone to initiate civil harassment proceedings against Cowan in the Circuit Court for the First Circuit, State of Hawaii, *Spoone v. Cowan*, Civil No. 57584 (Haw. Cir. filed Apr. 5, 1979), A4, and led the prosecutor for the City and County of Honolulu to file criminal assault and harassment charges under Haw. Rev. Stat. §§ 707-712 & 711-1106 against Cowan in the District Court of the First Circuit, Honolulu Division, *State v. Cowan*, HPD Nos. M-00566 & M-00567 (Haw. Dist. filed Jan. 21, 1980), A10, 219, 252. In these hotly contested, and ultimately inconclusive proceedings, Hawaii's judges, particularly Judge Shintaku, faced the task of seeking compliance with their own orders and the law while balancing respondent's desire to control his fate against the chance that allowing him to do so, given his erratic behavior, would result in a wholesale miscarriage of justice.

1. The Civil Harassment Proceedings in Civil No. 57584.

The civil harassment case was ostensibly settled on May 15, 1979, when Cowan agreed to an injunction barring him from writing, following, or telephoning Spoone, or driving by her house in Hawaii Kai, in East Honolulu, A4, 193-94. Cowan violated this order almost immediately, and found himself in contempt proceedings that led Judge Shintaku, the third judge to hear the case, to impose and then suspend a six month prison term and $500 fine on July 27, 1979. A5, 194-98. On December 11, 1979, Spoone moved for contempt and sanctions, including prison, A6, 199-200. Judge Shintaku, after hearing evidence, did not at first give the full six-month term "because if [Cowan] were found psychiatrically delusional, any sentence the Court imposed would have no effect,"

A200, but ordered weekend jail visits and psychiatric examination under Haw. R. Civ. P. 35. *Id.* Cowan then demanded a six month term. A201. Judge Shintaku committed Cowan to Halawa Jail for such a term, but recommended that he be "psychiatrically examined." *Id.*

That examination was performed by Dr. Golden. His evaluation, dated January 8, 1980, A204-09, found that Cowan manifested "persecutory delusional" traits, A205, was "substantially delusional," A206, had no "socialized goals," *id.*, had potential for "malignant and aggressive" behavior, A207, was "generally suspicious," *id.*, and "utterly intractable to reason," *id.*, suffered "approximate schizophrenia, paranoid type," A208, was "not responsible for his behavior at the time of the alleged offense" and "is quite possibly unfit to stand trial." *Id.*

Dr. Golden advised "that a full sanity commission be empaneled," and that Cowan be moved to Hawaii State Hospital. A208-09. Cowan was released on January 28, 1980, on condition that he submit to treatment, A211, but was rejailed on Judge Shintaku's orders after an *ex parte* hearing on February 5, 1980, at which Cowan, apparently, was accused of further violations of the injunction and involvement in a fire bombing. A214. Judge Shintaku also apparently at that time ordered the institution of involuntary commitment pursuant to Chapter 334. *Id.*

2. The Criminal Proceedings in M-00566 & M-00567.

Meanwhile, on January 21, 1980, the Office of the Prosecutor for the City and County of Honolulu initiated third degree assault and harassment charges, misdemeanors under Hawaii law, arising out of the

March 28, 1979, altercation. A219. Deputy Public Defender Goya appeared for Cowan in state District Court on March 20, 1980, A13, and Cowan was arraigned on March 24, 1980, in the presence of counsel, before District Judge Edwin H. Honda, and released without additional bail. A220. On March 25, 1980, a hearing, in Mr. Goya's words, "on fitness on Mr. Cowan," A222, was held before District Judge Andrew J. Salz. Respondent was present, and he and the Court had this exchange:

> MR. COWAN: . . . My primary purpose is not to prove that I wasn't guilty, or to get off, my primary purpose is to somehow convince her that I love her and care about her, and would like to be cared for by her. And that's the bottom line. . . . [T]he bottom line is I'm willing to go to jail for an additional year or six months on that.
>
> THE COURT: That's not going to sell Jeannie or anybody. Nobody in the world is going to be convinced by your willingness to stay in jail that you love her. All you're doing is forcing incarceration on yourself, and being a heavy financial burden on the State. And that is all that is being accomplished. Nothing more.
>
> MR. COWAN: I can't—that's the only communication with Jeannie that is left. And—
>
> THE COURT: It's not a way that is left. It's a way that isn't left, and somehow you latched on to it. It's a very sad state of events that you should latch on to that.
>
> MR. COWAN: I say I'm willing to admit that I'm psychotic. I've read some books where the words in them have meaning for me to understand. And

> I'm willing to be treated. In fact, I did make the offer in jail.

Tr., *State v. Cowan*, No. M-00567 (Dist. Haw. Mar. 25, 1980), A224. Such talk confirmed Judge Salz's "very definite feeling," which had been sown by reading "Dr. Golden's letter which is on file in this matter," that we're going to require a three-man board [under Haw. Rev. Stat. § 704-404] to examine Mr. Cowan," A222. No written order was entered pursuant the March 25, 1980, hearing, and, on April 8, 1980, Deputy Public Defender Goya moved for such an order, basing the motion on his sworn affidavit attesting that, on "information and belief," Cowan "had been examined by Dr. Golden on a related civil matter and it was Dr. Golden's professional opinion that Defendant was suffering from a mental disease, disorder or defect." A229-31. State District Judge Kanbara entered the order that day. A234. The three-member panel came to mixed conclusions, A15-17, 51, 235-40, and Cowan had a bench trial on the assault charge on July 10, 1980, with new appointed counsel before Judge Honda, A241.

At his criminal trial, Cowan abandoned the lack of capacity defense and claimed instead a right to use force to defend his motor scooter. Haw. Rev. Stat. § 703-306. He was convicted. A241, 244. That conviction was vacated on February 18, 1981, because Cowan, while entitled to a jury, had not been appraised of that right. A243. On January 18, 1982, Judge Kanbara dismissed the assault charge with prejudice for want of timely prosecution. A245. In the interim, the prosecution had also dismissed the harassment charge. Having been moved to Hawaii State Hospital by Judge Shintaku on April 7, 1980,

pursuant to Goya's claim that Judge Salz had ordered a § 704-404 panel in the criminal case, A217-18, Cowan had been free since June 5, 1980. A17. No civil commitment case was ever initiated.

C. Proceedings Below.

Cowan commenced this civil action for damages under 42 U.S.C. § 1983, and assorted state-law theories, in the Circuit Court for the First Circuit, on June 7, 1982. *Cowan v. State*, Civil No. 71638 (Haw. Cir. filed June 7, 1982), A133-63. Insofar as is relevant here, Cowan alleged that he never intended to assert a mental irresponsibility defense in the criminal assault case, and that Shintaku, Golden, and Goya, along with Sandra Alexander, the Deputy Prosecutor, and Ken Kuniyuki, Spoone's attorney, conspired "to deprive [Cowan] of his right to counsel, to deprive [Cowan] of his right to assert a defense of his own choosing, and to illegally impose GOYA . . . as [Cowan's] 'guardian,' " and likewise agreed "to improperly influence the District Court to order the three-member psychiatric examination of [Cowan]." Complaint ¶¶ 85, 91, A156-58.

Petitioners timely answered that these allegations (Counts XV and XVI), and Cowan's sixteen other claims, were barred by, among other things, absolute judicial and quasi-judicial immunity, and the two-year personal-injury limitations period set forth in Haw. Rev. Stat. 657-7. Amended Answer, *Cowan v. State*, No. 71638 (Haw. Cir. filed Dec. 22, 1982) at ¶¶ 57, 58, 63, A169-70. After we moved for dismissal or summary judgment on these grounds under Haw. R. Civ. P. 12 and 56, A173-81, the Circuit Court dismissed all claims against us with prejudice on June 14, 1983. A55-57. The Court also dismissed claims

against Goya for want of service, and against the State for lack of consent to suit. A56. The City defendants were also dismissed. A58-59. Cowan then dismissed Kuniyuki, A20, and appealed.

The Intermediate Court of Appeals, *see* A279, issued its decision on October 22, 1986. Although it summarily affirmed the dismissal of most claims, it also vacated the judgments with respect to the two counts described above—Counts XV and XVI—viewing them as a claim for "civil conspiracy" under "42 U.S.C. § 1983." *Cowan v. State*, No. 10256 (Haw. App. Oct. 22, 1986), A32. Despite our extensive brief on absolute judicial immunity, *see* A74-79, and its own citations to *Stump v. Sparkman*, 435 U.S. 349 (1978), A37, the court overlooked how this basic immunity for "judicial acts" not undertaken in the "clear absence of all jurisdiction" applied to Cowan's claims arising out of an asserted right to override Goya's judgment.

Thus, the Court of Appeals failed to appreciate that there could not be a more "judicial" act for a state judge than doing what is expressly contemplated under § 704-404, and what Judge Shintaku is claimed to have done: interjecting *sua sponte* (and thus overriding what a defendant may want his counsel to be doing) the court's claim that there is "reason to doubt [defendant's] fitness to proceed" or "reason to believe" that mental irresponsibility will be "an issue in the case." In fact, because Cowan had not waived a jury, and the case was thus presumptively in the Circuit Court's bailiwick, Judge Shintaku, of every judge involved, was the one judge with clearest jurisdiction to enter a § 704-404 evaluation order.

Similarly, despite Judge Salz's recognition that Dr. Golden's report had been duly filed in the assault case, the court rejected Dr. Golden's immunity claim even as it agreed that "[c]ourt appointed psychiatrists who prepare and submit medical reports to state court are absolutely immune from liability for damages under § 1983," A40. On top of this, while *Wilson v. Garcia*, 471 U.S. 261 (1985), subjected § 1983 claims in Hawaii to the two-year personal injury statute, *see* A72 n.1, and although no Hawaii court suggested until 1986 that § 1983 claims could be heard in state court at all, much less under a six-year limitations period, *see Makanui v. DOE*, 721 P.2d 165 (Haw. App. 1986), the Court of Appeals relied on *Lai v. City & County*, 749 F.2d 588 (9th Cir. 1984), which, although overruled by *Garcia*, espoused the six-year rule. A36.

Petitioners moved for reconsideration on both immunity grounds and on *Garcia's* retroactivity. A83-84, 87-89. The Court of Appeals issued an order ruling, on immunity, that petitioners, "who were involved in Spoone's circuit court civil case," had, on the record, and as a matter of law, acted "in the clear absence of all jurisdiction," in allegedly having "Cowan's attorney in the district court criminal case against Cowan rely on the defense of mental irresponsibility which Cowan alleges he did not want to rely on rather than on the defense of the authorized use of force which Cowan alleges he wanted to rely on." *Cowan v. State*, No. 10256 (Haw. App. Oct. 8, 1986), A47. Relying on "persuasive" Ninth Circuit authority, the court held that it would not apply *Garcia* here. A46.

Petitioners sought a writ of certiorari from the Supreme Court of Hawaii under Rule 31, Haw. R. App. P. The issues presented to our state supreme court read as follows:

> 1. Whether the immunity to which judges and those performing quasi-judicial functions are entitled when sued in their individual capacities under the federal civil rights statutes, *e.g.*, 42 U.S.C. § 1983, or substantive constitutional principles, bar claims here based on allegations that a Hawaii circuit judge and court-appointed officials interfered with a criminal defendant's claimed rights not to assert a mental irresponsibility defense and to thus avoid a psychiatric examination required by state law when that defense is raised?
>
> 2. Whether, with respect to a claim pursuant to the federal civil rights laws, *e.g.*, 42 U.S.C. § 1983, filed before *Lai v. City and County*, 749 F.2d 588 (9th Cir. 1984), and the overruling decision in *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), the Hawaii courts must follow *Garcia* and apply the personal injury limitations period of two years, which is set forth at Hawaii Rev. Stat. § 657-7 (1976)?

A94. Petitioners, in their argument in support of certiorari, vigorously attacked the Intermediate Court of Appeals decision as contrary to *Stump v. Sparkman*, 435 U.S. 439 (1978). *See* A99-101. We also raised three claims why the intermediate court wrongly ignored the *Garcia* decision, only the last of which depended on a reversal in *St. Francis College v. Al-Khazraji, cert. granted*, 107 S. Ct. 62 (Oct. 6. 1986). A101-04. On October 30, 1986, the Supreme Court of

Hawaii granted the writ without limitation. *See* Rule 31(e)(9), Haw. R. App. P., A280; Order, *Cowan v. State*, No. 10256 (Haw. Oct. 30, 1986), A53.

On June 23, 1987, the Supreme Court of Hawaii affirmed the decision of the Intermediate Court of Appeals in all respects with a one line order that did not discuss any of the immunity claims presented, and, on *Garcia*'s retroactivity, reasoned that because the defendant in *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987), did not win, nor could we. The Supreme Court of Hawaii was apparently unaware of *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987), in which review had been granted on December 1, 1986, *see* A53, handed down four days before the order in this case. Once again invoking Rule 40, Haw. R. App. P., *see Robinson v. Arivoshi*, 65 Haw. 641, 660, 658 P.2d 287, 302 (1982), petitioners repressed both immunity issues, *see* A110, 123-28, and the *Garcia* question, *see* A110-11, 117-23. Regrettably, the Supreme Court of Hawaii did not correct its Order, and, on July 10, 1987, issued another order stating that because we had represented that review under Rule 31 would relieve this Court "of the burden of correcting manifest error if *St. Francis College* is reversed," the court would not "consider different points." Order Denying Recon., *Cowan v. State*, No. 10256 (Haw. July 10, 1987), A62-63.

REASONS WHY THE WRIT SHOULD BE GRANTED

There is no doubt, nor should there be, that litigants seeking interlocutory review of state court judgments under 28 U.S.C. § 1257(3) must overcome several critical requirements to invoke this Court's jurisdiction. For this reason, much as the Supreme

Court of Hawaii's disobedience of *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987), is flagrant, it would present too great a threat to the values of the final judgment rule to seek review of our *Garcia* issue at the present time.

What does merit review is the disturbing swath the decision below cuts through the absolute immunity rules that are core components of § 1983's remedial framework. This Court's decisions squarely support review of these claims under the collateral order doctrine, and no serious argument exists that the decision below rests on adequate state grounds. In light of this fact, the factors counseling review under Rule 17 are forcefully present. The lower courts' decision to strip Judge Shintaku of his judicial immunity is correct *only* if a fortuity—that Judge Shintaku was not personally assigned to sit on the criminal as well as the civil case—rendered effectuation of his expert's report in the criminal case (1) "non-judicial" or (2) "in the clear absence of jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 n.7, 359, 362 (1978). Both conclusions are plainly wrong under this Court's cases, and present gaping conflicts with decisions by the courts of appeals. Allowed to stand, the decision below will tell any state judge in Hawaii inclined to thwart ongoing error in a fellow judge's criminal case that he does so without the "firmly established" protection of judicial immunity that this Court routinely acknowledges. *See Cleavinger v. Saxner*, 106 S. Ct. 496, 500 (1985). Because the lower courts' immunity analysis as to Judge Shintaku so clearly departs from *Stump v. Sparkman*, summary reversal would be plainly warranted. *Cf. Massachusetts v. Upton*, 466 U.S. 727. 728 (1984) (per curiam).

Certiorari should also be granted to review the denial of Dr. Golden's immunity. The thrust of Cowan's complaint is that the district judges were "improperly influenced" by Dr. Golden's January 8, 1980, report. The Hawaii courts here recognized, *see* A39, and they should, that if Judge Shintaku were immune, Dr. Golden also would be. *See Siebel v. Kemble*, 63 Haw. 516, 527, 631 P.2d 173, 180 (1982); *see also Moses v. Parwatiker*, 813 F.2d 891, 892 (8th Cir. 1987). Dr. Golden, through his report, was also a "central actor" in his own right in the assault case, and enjoyed independent immunity under *Briscoe v. LaHue*, 460 U.S. 325 (1983), and the caselaw interpreting it. The conflict between these precedents and the Hawaii courts' decision here is an important one meriting review even if the central issue of Judge Shintaku's immunity somehow is not.

Finally, as this Court has granted review in *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987), and will, we are confident, reaffirm *Stump*'s basic premises whether it affirms or reverses in that case, if this Court determines summary reversal or plenary review would be inappropriate, we would ask that this Court, in the alternative, to hold the Petition for Certiorari pending a decision in *Forrester*, and remand the case for further proceedings not inconsistent with that decision so that the Supreme Court of Hawaii, upon the suggestion of error implicit in such a disposition, *see* this Court's Rule 17, might reconsider its immunity analysis and enter a final judgment in favor of petitioners.

I. This Court Has Jurisdiction Under 28 U.S.C. § 1257(3) to Hear Petitioners' Substantial Claims to Immunity from Suit in State Court Under 42 U.S.C. § 1983.

A.

Under 28 U.S.C. § 1257(3), this Court has jurisdiction over "[f]inal judgments or decrees" emanating from the state courts, and normally, where an affirmative federal claim for monetary relief has not been reduced to judgment, this language bars review of federal defenses rejected by the state courts. *See California v. Rooney*, 107 S. Ct. 2852, 2855 n.2 (1987). Under the collateral order rule of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), however, which applies to cases under § 1257(3) *see National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam), "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). The heart of this case is the contention that the conduct of which Cowan complains implicates the most basic function of a state judge: avoiding plain error. Deference to state judges is at its height here, *see Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982), and, until this case, no court has ever suggested a judge could be liable for overzealous concern for due process, even when that concern may have trenched on a defendant's autonomy. Petitioners' claims meet the *Cohen* test.

B.

Despite the Supreme Court of Hawaii's seemingly hostile orders, our claims also survive the most rig-

orous application of the adequate state ground doctrine, *see Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), and the pressed or passed upon rule, *Heath v. Alabama*, 106 S. Ct. 433, 436-37 (1985) (citations omitted). When certiorari was sought below, the immunity issues had been clearly passed upon, *see First English Church v. County of Los Angeles*, 107 S. Ct. 2378, 2385 n.8 (1987). Petitioners pressed those claims on certiorari, as we had during the entire case below. That we asked, alternatively, for the court to hold the petition below pending *St. Francis College, supra*, could not conceivably be construed as a waiver of the immunity claims. *Cf. Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 219, 664 P.2d 745, 752 (1983) (estoppel does not come into play unless prayers are mutually exclusive). Even if the court below wanted to impose a waiver, *but see Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984) (per curiam), this Court would construe such an effort for what it would be—an improper attempt to preclude review. *See Hawthorn v. Lovorn*, 457 U.S. 255, 263 (1982). The court below did not limit the issues on review. Its affirmance is a denial on the merits. *R.J. Reynolds Tobacco Co. v. Durham County*, 107 S. Ct. 499, 506 (1986).

II. The Denial of Absolute Judicial Immunity for Acts Undertaken to Determine Whether a Criminal Defendant is Sane Presents Substantial Questions Meriting Review, if Not Summary Reversal.

The judgment of the courts below rests on a view that judicial immunity is defeated if the Judge is not "involved," that is, present in a technical sense of "being assigned to" the case in which formal orders issue. Order Denying Appellees' Motion for Reconsideration, *Cowan v. State*, No. 10256 (Haw. App. Oct.

8, 1986), A45. In adopting this view, the Hawaii courts have radically undercut the immunity analysis in *Stump v. Sparkman*, 435 U.S. 349 (1978), which reflects settled principles that this Court has "followed . . . for more than a century," *Cleavinger v. Saxner*, 106 S. Ct. at 500. In doing so, the lower court, just as radically, expands the reach of § 1983.

Stump's now-familiar two-part test mandates dismissal of federal damage claims whenever "the nature of the act itself" is a judicial one, *id.*, at 360, and the action taken is not "in the clear absence of jurisdiction," *id.*, at 357 n.7. In holding Cowan's allegations that Judge Shintaku had conspired with Goya to deny Cowan effective assistance defeated immunity under this test, the courts below made the identical mistakes that led to reversal in *Stump*. However one might view judges' claims for "judicial" immunity when they act as prosecutors or witnesses in their own cause,[3] here there can be—indeed was—no claim that Judge Shintaku was acting, if he was acting at all, as anything less than a judge seeking to assure that a conviction in a case over which he had concurrent subject matter jurisdiction could stand in light of decisions like *Jackson v. Virginia*, 443 U.S. 307 (1979), and *Drope v. Missouri*, 420 U.S. 162 (1975). Whether the Judge invaded the sphere reserved under *Faretta v. California*, 422 U.S. 806 (1975), and *McKaskle v. Wiggins*, 463 U.S. 168, 178 (1984), is and

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[3] *See Harris v. Deveaux*, 780 F.2d 911, 914 (11th Cir. 1986) (initiation of charges does not oust judicial immunity; distinguishing *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984); *Harper v. Merckle*, 638 F.2d 848 (5th Cir. Unit B), *cert. denied*, 454 U.S. 816 (1981); and *Lopez v. Vandewater*, 620 F.2d 1229 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980)).

should be irrelevant to whether the act was "judicial." That what is involved in the end is "balancing" the state's right to a conviction that will stand against an accused's right to run his defense proves this is and was a core judicial function.

Moreover, the task of depriving defendants of the right to represent themselves when they are incompetent (as opposed to just representing themselves incompetently) is a function Hawaii expressly delegated to the trial judges under the well-accepted "plain error" rule. *See* Haw. Rev. Stat. § 704-404. Exercise of this delicate power—coercively or beneficially—is an "act normally performed only by judges." 435 U.S. at 362. That Judge Shintaku did not go off and empanel the sanity commission himself should not be viewed as vice, but virtue. Under a doctrine developed by the Ninth Circuit, and, until this case, followed by Hawaii courts, the fact that Goya's motion for convening the psychiatric panel was granted by an independent judicial officer after Cowan had a full opportunity to address the Court provides an *independent* immunity defense based on the immunity of the judge issuing the order. *See Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986); *Bullen v. Derego*, 724 P.2d 106, 109 (Haw. 1986). The decision below, if permitted to stand, not only wipes out this immunity but transforms a judge's laudable decision to issue orders only in his own cases into a waiver of his own judicial immunity whenever he communicates information to judges who sit on other cases. Such communications, which in many instances ought be encouraged, *see* Commentary to Canon 3(a)(4), A.B.A. Canons of Judicial Ethics (1975), surely are judicial acts under the *Stump* test. Indeed, even

the dissenters in *Stump* would have agreed that Judge Shintaku's actions were of a judicial nature, for, unlike the truly irreparable horrors visited upon Linda Sparkman, any improper disqualification of Cowan as his own counsel could have been remedied on appeal. *See Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985); *Flanagan v. United States*, 465 U.S. 259 91984). All of the players in the criminal case dealt with Judge Shintaku "as a judge." For this array of reasons, identical damage claims attacking judicially-ordered ineffective assistance were rejected by the Eighth Circuit in *Birch v. Mazander*, 678 F.2d 754 (8th Cir. 1982) (judge cannot be liable for appointing criminal defense counsel who has no authority to act for defendant). It is also for these reasons that this Court's resources are sorely needed here. In excluding interchambers communications on pending cases—or even communications between Court and defense counsel—from judicial immunity, the lower courts have set the stage for a flood of lawsuits that now can be defended only under the fact-specific objective-qualified immunity rule, *i.e.*, *Anderson v. Creighton*, 107 S. Ct. 3034 (1987), or what would be undoubtedly worse, a distortion of judicial behavior among the dozens of state judges in Hawaii, each of whom must now guess whether the next step he or she takes will lead to personal litigation.

That threat is made all the more obvious by the lower courts' amazing suggestion that Judge Shintaku acted "in the clear absence of all jurisdiction." It could not be plainer that Judge Shintaku, as a trial judge of the Circuit Court, had subject matter jurisdiction to do exactly that of which Cowan complains, either by ordering a § 704-404 evaluation himself,

under his own criminal subject matter jurisdiction, or as an aid to his civil jurisdiction. Judge Shintaku could have inflicted related injuries via guardianship or civil commitment proceedings or even, as in the original civil case, under Rule 35. The *only* explanation for the ruling below therefore is a claim that Judge Shintaku is deprived of immunity because he acted—if he acted at all—without giving the notice and opportunity for hearing necessary to confer personal jurisdiction on his court. But as this Court held in *Stump*, only when a court acts " 'without having any jurisdiction whatever' " is judicial immunity ousted. 435 U.S. at 359 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872)).[4] Yet the trial judges who must labor in the shadow of the *Cowan* ruling[5] must be "involved" in every technical sense or immunity is lost. This unwarranted expansion of judicial liability under § 1983 in our Fiftieth State warrants this Court's review and reversal.

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[4] Indeed, *every* federal court of appeals that has considered the issue has expressly held that allegations of conspiracy or due process violations do not oust jurisdiction for immunity purposes. *See Moses v. Parwatiker*, 813 F.2d 891, 893 & n.2-4 (8th Cir. 1987); *Ashelman v. Pope*, 793 F.2d 1072, 1978 (9th Cir. 1986) (en banc); *Van Sickle v. Holloway*, 791 F.2d 1431, 1435 (10th Cir. 1986); *Dykes v. Hosemann*, 776 F.2d 942, 946 (11th Cir. 1985); *Holloway v. Walker*, 765 F.2d 517, 523 (5th Cir.), *cert. denied*, 106 S. Ct. 605 (1985).

[5] Under Rule 35, Haw. R. App. P., the *Cowan* decisions in the lower courts will not viewed as binding precedent. This fact, we submit, only heightens the need for review inasmuch as the lower courts' rules for creating this second tier jurisprudence suggest that the Hawaii courts may well view the *Cowan* case as presenting "issues [that] are not new, [and] where an exposition is not going to add greatly to the law." 20 Haw. B.J. 99 (1987) (interview with Justice Frank Padgett).

III. The Lower Court's Decision Denying Immunity to the Court-Appointed Psychiatrist Also Merits Review.

To borrow this Court's observation in a related context, were immunity to be granted to Judge Shintaku but denied to Dr. Golden, the law "would fail at the time it would be needed." *Dalehite v. United States*, 346 U.S. 15, 36 (1953) (28 U.S.C. § 2680(a)). If review is granted in favor of Judge Shintaku, it follows from the long line of decisions construing quasi-judicial immunity for court-appointed experts and employees that review likewise should be granted in favor of Dr. Golden. *See Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir. 1987) (citing cases). As we argued to the courts below, Dr. Golden was also immune in his own right as a court witness whose report was later relied on by the District Court. *See Parwatiker, supra*, 813 F.2d 892 (citing *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984)). In holding to the contrary, the lower court ignored the principles of *Briscoe v. LaHue*, 460 U.S. 325 (1983), which extends absolute immunity to witnesses "in judicial proceedings," *Cleavinger*, 106 S. Ct. at 496; *see also Mitchell v. Forsyth*, 472 U.S. at 520. Under Hawaii law, Dr. Golden was subject to prosecution for false statements in his report, Haw. Rev. Stat. § 710-1063 (1985), and, accordingly, the lower court's refusal to accord those statements full protection conflicts with a growing body of caselaw extending *Briscoe* to witnesses in pretrial proceedings. *See Kompare v. Stein*, 801 F.2d 883, 890 (7th Cir. 1986); *Macko v. Byron*, 760 F.2d 95, 96 (6th Cir. 1985); *cf. San Filippo v. United States Trust Co.*, 737 F.2d 246, 254 (2d Cir. 1984) (upholding immunity for testimony itself but not for extra-judicial conspiracies), *cert. denied*, 470 U.S. 1035 (1985); *contra,*

Wheeler v. Cosden Oil & Chemical Co., 734 F.2d 254, 261 (5th Cir.), *modified*, 744 F.2d 1311 (1984). Given these conflicts, and the enormous impact the decision below will have in chilling the use and dissemination of psychiatric evaluations, this Court should grant review to Dr. Golden's claims of absolute immunity even if somehow Judge Shintaku's do not independently warrant review. *See United States Trust, supra*, 470 U.S. at 1037 n.* (White, J., dissenting from the denial of certiorari on pre-trial conspiracies to present false testimony to grand juries).

IV. Alternatively, the Court Should Hold the Petition Pending the Decision in *Forrester v. White*, No. 86-671.

Even if the Court were to conclude that a summary reversal or plenary review would be an inappropriate exercise of this Court's powers, it should still take action to suggest to the Supreme Court of Hawaii that its cavalier rejection of petitioners' federal absolute immunity defenses merits reconsideration. At this moment, this Court is working toward consideration of *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987), which presents the issue whether a state judge's decision to fire a probation officer is protected by absolute judicial immunity. As we argued to the court below, A123, no matter how *Forrester* is decided it is most unlikely that this Court's forthcoming guidance will cast doubt on our basic immunity claim. As Judge Posner was more than willing to agree in his dissent, when a state judge "with general jurisdiction" settles "the affairs" of a person of arguable competence, he is not acting "without a jurisdiction." *See Stump*, 435 U.S. at 362 n.11, *cited*, 792 F.2d at 663 (Posner, J.,

dissenting). At the least this Court should hold this case pending decision in *Forrester*, and, if it upholds the precepts of *Stump* that we believe require a judgment in our favor, vacate the judgment below and remand for further proceedings not inconsistent with this Court's decision. It might be hoped that the suggestion of error implicit in such a disposition would cause our state courts to alter their view and enter a judgment in our favor. *Cf. Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964).

CONCLUSION

The Supreme Court of Hawaii's decision rejecting absolute immunity claims by a judge of our state trial court of general jurisdiction, involving actions he allegedly took to implement the recommendations of his duly-appointed psychiatric expert, who concluded that failure to take action could well lead to an unconstitutional criminal trial of respondent, creates anomalous and unprecedented gaps in the "solidly established" doctrinal protections for judicial officers who decide conflicts of the gravest character. The failure to accord the psychiatrist absolute immunity equally if not more egregiously stripped settled protection from a central actor in the judicial system.

The recognition of immunity here would not have barred respondent from a remedy. If his charges were true, his defense attorney may well have breached state law or even federal standards for which a remedy may have been available. *See Tower v. Glover*, 467 U.S. 914 (1984). Respondent failed to pursue this route, however, and the Supreme Court of Hawaii's response can be properly answered by "that well-worn adage that 'two wrongs do not make a right.' "

Gray v. Mississippi, 107 S. Ct. 2045, 2054 (1987). Because the decision below treads upon rights that will be lost if review is not granted at this time, conflicts with decisions of this Court, and of the federal courts of appeals, and charts a novel expansion of liability of judicial officers and their court-appointed experts that deeply threatens the administration of justice in our State, the Court should grant the petition for certiorari and summarily reverse the judgment below or grant plenary review. In the alternative, the Court should hold this petition in light of the grant of review in *Forrester v. White, cert. granted*, 107 S. Ct. 1282 (1987), and, when *Forrester* is decided, grant the petition, vacate the judgment below, and remand for further proceedings consistent with the decision that is rendered in *Forrester*.

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Respectfully submitted,

WARREN PRICE, III
Attorney General
State of Hawaii

CORINNE K.A. WATANABE*
First Deputy Attorney General
State of Hawaii
**Counsel of Record*

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for Petitioners